Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

SYLVESTER JOHN ANDERSON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Special Appeals of Maryland err in applying overruled United States Supreme Court case law and an overly-deferential standard of review in determining Petitioner's standing to contest the constitutionality of a warrantless search?

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REFERENCE TO OPINIONS DELIVERED

1. *Maryland v. Anderson*, No. 93-0607X (Circuit Ct. of P.G. Cty. July 27, 1993).

2. *Anderson v. Maryland*, No. 17, slip op. (Md. App. October 25, 1994), *cert. denied*, 654 A.2d 447 (Md. 1995).

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Court of Special Appeals of Maryland affirmed the conviction of Petitioner, which had been entered in the Circuit Court for Prince George's County, Maryland. The Court of Appeals, on March 7, 1995, denied Petitioner's Petition for Writ of Certiorari to the Court of Special Appeals.

The United States Supreme Court has jurisdiction to review this judgment under 28 U.S.C. § 1257, which states in part, "[f]inal judgments . . . rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is . . . claimed under the Constitution or statutes of . . . the United States." In the present case, a "right, privilege or immunity" is claimed under the Fourth Amendment of the United States Constitution.

Further grounds upon which this Court's jurisdiction is premised is stated in United States Supreme Court Rule 10.1 (c): "When a state court . . . has decided a federal question in a way that conflicts with applicable decisions

of this Court," a petition for a writ of certiorari may be granted.

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons to be seized.

STATEMENT OF THE CASE

On the evening of December 31, 1992, petitioner, Sylvester John Anderson ("Anderson"), was the junior manager of Players Pool Room ("Players").[1] As manager, Anderson had a set of keys, was allowed to close Players, and had authority to make business decisions. He primarily carried out his responsibilities from a work area behind the counter. These responsibilities included collecting receipts, handing out pool balls, taking money, and passing out food and drinks. Although no customer had the "right" to go behind the counter, Anderson

[1] The facts presented are those relied on in the Court of Special Appeals of Maryland opinion affirming Anderson's conviction.

allowed certain "regular customers" behind the counter for limited purposes.

On December 31, 1992, during Anderson's shift, Prince George's County police officers entered Players and conducted a warrantless search of the work area behind the Players' counter and recovered twenty baggies of cocaine, a baggie of marijuana, a marijuana cigarette, and two handguns. The Court made a factual determination that Player's senior manager, Isaac Saul, consented to the search.

The Circuit Court for Prince George's County ruled that Anderson lacked standing to contest the legality of the search, and admitted the above evidence:

> The Court, after listening to the evidence and considering the principles set forth in Lucich v. State, and all the cases that follow thereafter, found at 194 Md. 511, as well as Resnick v. State at 183 Md. 15 . . . find[ing] and *applying those principles* to the facts I've heard here, *find as a fact* that defendant in this case did not have an expectation of privacy.
>
> In fact, when asked, he said he didn't have the authority to grant it, that there was a senior manager present.
>
> In addition to that, from the testimony I have heard from the defendant indicates that the area in which the officers looked was certainly not restricted. The public was even allowed to come back there and use the facilities.

> The only thing that I could think of that there would be a reasonable expectation to privacy was the cash register, which he indicated he locked up when he wasn't there.

(Motion to Suppress before the Circuit Court for Prince George's County, Maryland, App. 1-2) (emphasis added). As a result of the admission of the evidence obtained from the warrantless search, Anderson was convicted. The Court of Special Appeals affirmed the ruling of the trial court, denying standing for Anderson to challenge the warrantless search. *Anderson v. Maryland*, No. 17, slip op. (Md. App. October 25, 1994). The Court of Appeals of Maryland denied review. *Anderson v. Maryland*, 654 A.2d 447 (Md. 1995).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. SUMMARY OF ARGUMENT

Standing to contest the constitutionality of a search requires a "legitimate expectation of privacy." *Rakas v. Illinois*, 439 U.S. 128 (1978). While this principle is clear, this case presents a novel application. Since this Court's decision in *Rakas*, the Court has not applied this principle to a warrantless search in a business setting.

The Court of Special Appeals of Maryland employed a previously overruled standard when it affirmed the trial court's decision on standing, and applied the wrong appellate standard of review in reviewing the decision of the trial court. If the correct law and standard had been properly applied, the court would have properly held

that Anderson had a legitimate expectation of privacy at his work station.

B. ARGUMENT

1. This case presents an important and novel application of the standard set forth in Rakas for determining standing to contest a warrantless search in a business setting.

While Fourth Amendment protection was extended to individuals in a business setting in *Mancusi v. Deforte*, 392 U.S. 364 (1968), this Court has not addressed the application of the law to a private work area since the Court promulgated the "legitimate expectation of privacy" standard for standing in *Rakas v. Illinois*, 439 U.S. 128, 142 (1978). Furthermore, this Court has never applied the law on standing to a search of a private workplace within a commercial establishment accessible to the public.

2. The Court of Special Appeals of Maryland has repeatedly applied the wrong law in determining standing to contest the constitutionality of searches.

a. The Rakas standard allows standing to contest a search if claimant has a "legitimate expectation of privacy."

The current Constitutional standard regarding standing to contest the legality of a search was established in *Rakas v. Illinois*, 439 U.S. 128 (1978). The Court stated that the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who

claims the protection of the Amendment has a *legitimate expectation of privacy* in the invaded place." *Id.* at 143 (emphasis added).

In reaching this conclusion, the Court rejected the doctrine of derivative standing set forth in *Jones v. United States*, 362 U.S. 257 (1960). According to *Jones*, one could have standing to challenge the legality of a search which produced evidence against him if he were "legitimately on the premises." *Jones*, 362 U.S. at 264. This Court concluded that "legitimate presence on the premises . . . cannot be deemed controlling." *Id.* at 149.

b. The Court of Special Appeals of Maryland has consistently applied the overruled *Jones* standard in determining a defendant's standing to contest the warrantless search.

Despite the clear dictate of *Rakas*, the Court of Special Appeals of Maryland, citing a prior opinion in *Burks v. Maryland*, 96 Md. App. 173, 194, 624 A.2d 1257, *cert. denied*, 332 Md. 381 (1993), held that "Fourth Amendment standing to object to the entry into or search of a place extends to persons with a possessory interest in the place entered, and others *legitimately on the premises* as their guests, licensees or invitees." *Anderson*, No. 17, slip op. at 2 (emphasis added). This statement mirrors the exact holding of the previously rejected *Jones* standard. Outrageously, the trial court opinion, which the Court of Special Appeals of Maryland affirmed, even relied expressly on the pre-*Jones* law on standing! App. 1 (citing *Lucich v. Maryland*, 71 A.2d 432, 434 (Md. 1950); *Resnick v. State*, 36 A.2d 347, 348 (Md. 1944)).

Burks was decided in 1993, and the Court of Appeals of Maryland denied the petition for certiorari. The *Anderson* court dangerously interpreted this denial as authority to continue to using the erroneous pre-*Rakas* (and even the archaic pre-*Jones)* standard. Unless this Court further clarifies the law on this issue, state courts, as they have twice before, may continue to apply overturned law in the area of Fourth Amendment jurisprudence.

3. The Court of Special Appeals of Maryland also applied the wrong appellate standard of review in affirming the trial court's judgment denying standing to object to the constitutionality of the warrantless search.

a. While factual determinations by a trial court are afforded greater deference, questions of law are reviewed *de novo*.

It is implicit in *Rakas* that appellate courts, while affording deference to the trial court on issues of fact, must conduct a *de novo* review of a trial court's legal determination of standing. *See also United States v Tortorello*, 533 F.2d 809, 812 (2nd Cir. 1976) ("Whether [defendant] has standing to challenge the legality of a search is a question of law."); *United States v. Padilla*, 960 F.2d 854, 858 (9th Cir. 1991).

b. The Court of Special Appeals of Maryland erroneously reviewed the trial court's determination under a clearly erroneous standard, rather than reviewing the issue *de novo*.

Instead of undertaking an "independent determination of the issues," *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967) (defining *de novo* review), the Court of Special Appeals of Maryland stated that it would "reverse only when, as a matter of law" the trial court's determination of standing was "clearly erroneous." *Anderson*, No. 17, slip op. at 2. Indeed, by choosing not to conduct a *de novo* review, the Court of Special Appeals of Maryland held that "the suppression judge could reasonably conclude that appellant had no reasonable expectation of privacy in the area searched." *Anderson*, No. 17, slip op. at 5.[2]

While factual findings should be subject to the "clearly erroneous" standard, the legally distinct question of whether petitioner had a "legitimate expectation of privacy," demands *de novo* review. No such independent constitutional appraisal of the record occurred below.

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[2] The Circuit Court judge himself erroneously held that "*as a fact* . . . [Anderson] did not have an expectation of privacy." (Motion to Suppress before the Circuit Court for Prince George's County, Maryland, App. 1-2 (emphasis added).)

4. Given the application of the correct law on standing, petitioner had standing to contest the search behind the counter of a pool hall.

a. Fourth Amendment rights are not waived in business settings.

In erroneously applying an overly deferential standard of review, the Court of Special Appeals of Maryland failed to analogize a single case concerning Fourth Amendment standing within the business setting.

In *Rakas*, 439 U.S. at 141-42, this Court emphasized that "a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." Indeed, although it was decided prior to *Rakas*, the Supreme Court applied the "legitimate expectation of privacy standard" within the business setting in *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968).[3]

In *Mancusi*, a union official *shared* his office with *several* other union officials. In addition, "the record d[id] not show from what part of the office the records were taken, and DeForte d[id] not claim that it was a part reserved for his exclusive personal use." *Id.* (emphasis added). On these facts, this Court held that DeForte had standing to object to the admission of evidence seized

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[3] "The holding in *Rakas* was foreshadowed by *Mancusi* . . . which, with respect to business premises (a union local office), focused on whether the area searched was one in which there was a reasonable expectation of freedom from governmental intrusion." *Illinois v. Davis*, 407 N.E.2d 1109 (Ill. App. 1980).

from that office. As for the fact that he shared the office with others, the Court ruled as follows:

> DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials, their conduct of a general search, and their removal of records which were in a DeForte's custody.

Id. at 369. *See also, United States v. Lefkowitz*, 464 F.Supp. 227 (C.D. Cal. 1979) (corporate officers had standing to contest search of their offices located in a suite); *United States v. Baker*, 443 F. Supp. 526 (S.D.N.Y. 1977) (Although more than one person used the office, the manager of Harlem Rivers Motor Garage had a "legitimate expectation of privacy" in the office.)

A similar conclusion was reached in *Illinois v. Davis*, 407 N.E.2d 1109 (Ill. App. 1980). Based on an informant's information concerning the illegal production of silencers, detectives made a warrantless entry through the unlocked main door of the building of a grinding company. Davis worked part-time for the grinding company, and was with a co-worker at a work bench across the room when the detectives entered. A detective found a closed but unlocked briefcase on the work bench, and opened the case and found an automatic pistol and silencer inside. *Id.*, 407 N.E.2d at 1111. The Court held that Davis had standing to contest the constitutionality of the search:

> In the instant case, as was true in *Mancusi*, the business premises entered consisted of a large open area not reserved exclusively for any given employee. *Rakas* and *Mancusi* confer a right to raise a Fourth Amendment challenge where there was a reasonable expectation of privacy against governmental intrusion. Thus, the fact that defendant might have expected co-workers to enter the building does not deprive him of a basis to challenge a police entry.

Davis, 407 N.E.2d at 1112.

Nor does this analysis change when somebody in a position of authority over a defendant can consent to a search. The Supreme Court specifically stated in *Mancusi* that "[i]t is, of course, irrelevant that the Union or some of its officials might validly consent to a search of the area" where the evidence was found, "regardless of DeForte's wishes." *Mancusi*, 392 U.S. at 369-70. In addition, in *Minnesota v. Olson*, 495 U.S. 91 (1990), where the Supreme Court held that an overnight guest has a legitimate expectation of privacy as a matter of law, the Court discounted the fact that the host "may admit or exclude from the house as he prefers." *Id.* at 99. As articulated by Justice White, "[i]f the untrammelled power to admit or exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parent's veto." *Id.* at 99-100.

b. If the Court of Special Appeals of Maryland had made an independent evaluation of the record in this case by properly analogizing applicable case law, it would have concluded that the trial court improperly denied Anderson standing to contest the legality of the search.

The Court of Special Appeals based its holding on the following:

(1) Deference to the trial court's finding.

(2) "Appellant had no proprietary interest in the premises." *Anderson*, No. 17 slip op. at 5.

(3) "[A]s junior manager, he deferred to Saul." *Id.*

(4) "[I]t was standard practice for off-duty employees to help him behind the counter." *Id.* at 6.

(5) "[I]t was standard practice for regular customers to go behind the counter to obtain drinks and use the microwave oven." *Id.*

(6) "When appellant left the counter he locked only the cash register, leaving the remaining areas open to others." *Id.*

However, all six factors have been rejected or discounted by the cited case law. As for (1), federal case law clearly demands that standing to contest the legality of a search should be reviewed *de novo*. As for (2), the "proprietary interest" standard is not controlling, as explained in *Rakas*. Instead, the appropriate inquiry is whether petitioner had a "legitimate expectation of privacy." As for (3), *Mancusi* and *Olson* hold that the ability of somebody

to veto a defendant's choice to decline a search request is *"irrelevant."*

As for (4) and (5), *Mancusi*, *Baker*, and *Davis* all hold that a defendant has standing to contest the constitutionality of a search even if the office or "large open area" was shared with employees and their guests. The fact that Anderson's work space in the case at hand happens to be located in a public area should not defeat his expectation of privacy. Finally, as for (6), in *Davis*, the Court held that the defendant had standing even though both the door to the grinding company and the briefcase on the work bench were unlocked. Thus, the fact that the area behind the counter is not locked is immaterial.

Therefore, the holding of the Court of Special Appeals is contrary to settled law.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Honorable Court to grant this petition.

Respectfully submitted,

FRED R. JOSEPH
JOSEPH, GREENWALD & LAAKE, P.A.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MD

STATE OF MARYLAND

vs. CT 93-0607X

SYLVESTER JOHN ANDERSON,

Defendant.

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REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(Testimony of Kenneth Huff and Steve Parker)

Upper Marlboro, Maryland

Tuesday, July 27, 1993

BEFORE:

HONORABLE GRAYDON S. McKEE, Associate Judge

APPEARANCES:

For the State:

WANDA DIXON, ESQUIRE

For the Defendant:

ARNOLD P. POPKIN, ESQUIRE

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THE COURT: The Court after listening to the evidence and considering the principles set forth in Lucich, L-U-C-I-C-H, versus State, and all the cases that follow thereafter, found at 194 Maryland 511, as well as Resnick vs. State at 183 Maryland 15. Those cases following from that. Find and applying those principles to the facts that I have heard here, I find as a fact that the defendant in this case did not have an expectation of privacy.

In fact, when asked, he said he didn't have the authority to grant it, that there was a senior manager present.

In addition to that, from the testimony I have heard from the defendant indicates that the area in which the officers looked was certainly not restricted. The public was even allowed to come back there and to use the facilities.

The only thing that I could think of that there would be a reasonable expectation to privacy was the cash register, which he indicates he locked up when he wasn't there.

For that reason, the Court denies the defense motion on the basis of standing, but I would also say that based on what I have heard that even if there was standing that this would be a search incident to an arrest, a lawful arrest, and I believe within the reach, grasp, lunge, and all the other good words that our appellate brothers and sisters use, and, therefore, it would be admissible under

that theory, too. I will rule on standing this time. Thank you very, very much.

MS. DIXON: Thank you, Your Honor.

(Whereupon, the hearing was concluded.)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 17

September Term, 1994

SYLVESTER JOHN ANDERSON, III

v.

STATE OF MARYLAND

Wilner, C.J.,
Wenner,
Davis,
JJ.

Per Curiam

Filed: October 25, 1994

Appellant Sylvester John Anderson, III, was convicted by a jury in the Circuit Court for Prince George's County of possession of cocaine with intent to distribute, and was sentenced to ten years of imprisonment without parole.

On appeal, appellant asks:

I. Did the lower court err by ruling that appellant had no standing to contest the search and seizure and by denying appellant's motion to suppress the search and seizure evidence?

II. Was the evidence insufficient to sustain appellant's conviction?

III. Did the lower court err by permitting hearsay testimony?

IV. Did the lower court err by allowing Corporal Parker to give opinion testimony on possession and sale of crack cocaine?

V. Did the lower court err by sustaining the prosecutor's objection to defense counsel's reading a case to the jury?

We shall answer each question in the negative, and affirm the judgments of the circuit court.

Facts

In the early morning hours of 31 December 1992, Prince George's County police officers entered Players Pool Room ("Players"). Appellant was an employee of Players and on-duty behind the counter. The officers conducted a warrantless search of the area behind the counter and recovered twenty baggies of cocaine, a baggie of marijuana, a marijuana cigarette, and two handguns in close proximity to the drugs. Appellant was arrested. We shall add such additional facts as are necessary to our discussion of the questions presented by appellant.

Discussion

I.

Appellant first contends that the suppression judge erred in denying his motion to suppress the evidence

seized from behind the counter because appellant lacked standing to contest the search and seizure. We disagree.

When reviewing the denial of a motion to suppression, we look only to the record of the suppression hearing, *Watkins v. State*, 90 Md. App. 437, 439, 601 A.2d 1115, *cert. denied*, 327 Md. 80 (1992), giving great deference to the suppression judge's determination of the credibility of witnesses and first-level findings of fact. *State v. Blackman*, 94 Md. App. 284, 293, 617 A.2d 619 (1992). Consequently, we reverse only when, as a matter of law, they are clearly erroneous. *Id.*

Fourth Amendment standing to object to the entry into or search of a place extends to persons with a possessory or other proprietary interest in the place entered, and others legitimately on the premises as their guests, licensees or invitees. *Burks v. State*, 96 Md. App. 173, 194, 624 A.2d 1257 (citations omitted), *cert. denied*, 332 Md. 381 (1993). Nonetheless, derivative standing is never superior to nor independent of the right asserted by the host. *Id.* A person with derivative standing has no constitutional complaint if the host chooses to invite the police onto the premises. *Id.*

> To establish standing, a person seeking to invoke application of the Fourth Amendment and its protections must "claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by [the] government. . . . " *Ricks v. State*, 312 Md. 11, 26, 537 A.2d 612 (1988), citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2579, 61 L.Ed.2d 220 (1979).

In determining when a legitimate expectation of privacy exists, two distinct questions must be answered.

> "[T]he first is whether the individual, by his conduct, has exhibited a subjective expectation of privacy (that he seeks to preserve something as private), and the second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable (whether the individual's expectation, viewed objectively, is justifiable under the circumstances). A legitimate 'expectation of privacy by definition means more than a subjective expectation of not being discovered.' "

Rakas, 439 U.S. at 143, n. 12, 99 S.Ct. at 430, n. 12, quoting *Ricks*, 312 Md. at 27, 537 A.2d 612. *Cheek v. State*, 81 Md. App. 171, 175-76, 567 A.2d 158 (1989), *cert. granted*, 318 Md. 639 (1990).

As appellant sees it, he was entitled to a reasonable expectation of privacy in the area behind the counter because it was an area under his control and not accessible to the public without his permission. According to appellant, however, he had no authority to permit the police to search the area and told them a senior manager was available.

The suppression judge concluded that the area behind the counter was not restricted, that the public was permitted to enter the area and use the facilities, and that appellant had no expectation of privacy in that area. Hence, since it is supported by credible evidence, the conclusion of the trial judge is not clearly erroneous.

a. Control over Area Searched

At the suppression hearing, appellant testified he was manager of Players between midnight and 8:00 a.m., and that his responsibilities included collecting receipts from all shifts, handing out pool balls, taking money, and passing out food and drinks. Appellant had keys and was to close Players if business was slow.

Appellant said he had told the police they could not conduct a search, that he was a junior manager and the senior manager, Isaac Saul, was in the back room, and told the officers they should obtain permission from Saul. Appellant said, "[o]n my shift [Saul] is senior manager over all things on certain things, . . . but on my shift, as long as it is on my clock from 12 to 8 I make all the decisions." As an example of his authority, appellant said if two guys were fighting, he would get them off the premises.

Corporal Kenneth Huff testified that when he asked appellant for permission to search the premises appellant "said that he really didn't have any control over that, but you can ask the manager." Huff also said that when he asked Saul for permission, Saul "didn't really care. He didn't say yes or no."

Corporal Steve Parker testified that appellant responded that "he doesn't mind if we search, but he doesn't have the authority to give the consent." Parker also testified that Saul permitted the search, saying "we have nothing to hide, go ahead."

b. Accessibility of Area Searched

Appellant testified that Saul has access to the area behind the counter, always gives a helping hand when not on duty, and that Player's policy is "always try to have two people there. [Other employees] are older than me and they know more about things around the business and they are showing me so, you know, they are helping me." After appellant's shift began on the night in question, Saul came behind the counter to get a cup of coffee, and Cartel, another off-duty manager, "was behind [the counter] working back and forth getting [himself] stuff to eat." The clean-up man also had access to the area behind the counter.

Appellant testified that, when working behind the counter, he would occasionally play pool or go to the bathroom. When leaving the counter, appellant said he would lock only the cash register, and "there can be anybody go behind the counter. When I'm playing pool or go to the bathroom, if someone would like to go behind there and get a drink, if they are okay with the business" they are permitted to do so. Moreover, even when appellant is on duty, "regular" customers are permitted behind the counter to use the microwave oven.

c. Expectation of Privacy

Based on this testimony, the suppression judge could reasonably conclude that appellant had no reasonable expectation of privacy in the area searched. Appellant had no proprietary interest in the premises, and as junior manager, he deferred to Saul, who was off-duty but on the premises during the incident. In addition to denying

that he had authority to consent to a search, appellant testified that he denied the officers' request, and directed them to Saul. In doing so, appellant acknowledged Sual's [sic] authority to consent to a search.

Appellant testified that the area searched was accessible to him, and to other employees and "regular" patrons. In other words, appellant did not suggest that employees or "regular" patrons needed appellant's permission to go behind the counter. Rather, it was standard practice for off-duty employees to help behind the counter and use the facilities and microwave oven. Likewise, it was standard practice for "regular" customers to go behind the counter to obtain drinks and use the microwave oven. When appellant left the counter he locked only the cash register, leaving the remaining areas open to others.

We hold that the suppression judge did not err in concluding that appellant had no subjective or reasonable expectation of privacy in the area behind the counter, and had no standing to challenge the search of and seizure from that area. In addition, appellant had no derivative standing because the evidence supports the suppression judge's conclusion that Saul consented to the search and had authority to do so.

II.

Appellant next contends that the suppression judge erred in denying his motion for judgment of acquittal because the evidence was insufficient to establish that appellant knew of, and exercised control over, the cocaine found behind the counter. We disagree.

In determining the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis supplied). It is a task for the trier of fact, rather than the reviewing court, "fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Moreover, judging the credibility of witnesses is also a task for the trier of fact. *McMillian v. State*, 325 Md. 272, 290, 600 A.2d 430 (1992).

To convict an accused of possession with intent to distribute, it is necessary for the State to prove that the accused possessed the controlled dangerous substance in quantities sufficient to indicate, under all of the circumstances, an intent to distribute. Md.Code Ann. Art. 27, § 286(a) (1992 Repl. Vol.); *Rich v. State*, 93 Md. App. 142, 149-50, 611 A.2d 1034 (1992), *vacated on other grounds*, 331 Md. 195 (1993). Possession is "the exercise of actual or constructive dominion or control over a thing by one or more persons," Md. Ann. Code Art. 27, § 277(s), and can be either constructive or joint. *Folk v. State*, 11 Md. App. 508, 511-12, 275 A.2d 184 (1971). It is not necessary to prove ownership of the thing and the duration of possession is immaterial. *Id.* Though it is necessary to prove that the accused had knowledge of the presence and illicit nature of the thing, knowledge may be proven by the circumstances. *Cook v. State*, 84 Md. App. 122, 134, 578 A.2d 283 (1990), *cert. denied*,. 321 Md. 502 (1991) (citing *Dawkins v. State*, 313 Md. 638, 651, 547 A.2d 1041 (1988)).

We consider the following factors in determining whether appellant possessed the illegal drugs.

> 1) proximity between the defendant and the contraband; 2) whether the drugs or contraband were within the plain view or otherwise within the knowledge of the defendant; 3) ownership or some possessory right in the premises; and 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual enjoyment of the contraband.

Rich, 93 Md. App. at 150.

Here, three of the above elements are present. When the police entered Players, appellant was behind the counter near two baggies of cocaine and a marijuana cigarette that were lying on the floor, a handgun on a shelf under the counter, eighteen baggies of cocaine in the microwave oven, and a baggie of marijuana and another handgun in the cabinet. According to Officer Parker, appellant was alone behind the counter and, as they arrived at Players, appellant momentarily disappeared behind the counter.

Officer Huff testified that, when leaning on the counter he saw two clear baggies containing what appeared to be rock cocaine and a marijuana cigarette in plain view behind the counter. While recovering these items, Huff saw a handgun on a shelf under the counter. Officer Chinn testified that he also saw the marijuana cigarette in plain view on the floor, and saw Officer Huff pick up the cigarette and two baggies of cocaine. Although Chinn said the baggies were not in plain view from his vantage point, he surmised they were from Huff's vantage point.

Officer Parker testified that, after Huff finished behind the counter, he searched the area where he had seen appellant momentarily disappear upon their arrival at Players. Parker found eighteen bags of cocaine in the microwave oven in that area, and a bag of marijuana and a handgun in a cabinet near the microwave.

Saul testified that he was second in command at Players, and that only one employee is on duty per shift. During incident, appellant was the cashier, in charge of the counter, and preventing "undesirables" from remaining on the premises.

Viewing this evidence in light most favorable to the prosecution, we hold that a rational jury could reasonably conclude, as this one did, that appellant was aware of the cocaine and exercised control over it. Even though appellant had no proprietary or possessory interest in Players, he was on-duty and responsible for the counter area during the time in question. Appellant was physically behind the counter and close to the contraband, some of which was on the floor. In fact, two baggies of cocaine were in plain view on the floor behind the counter. The microwave oven contained eighteen baggies of cocaine and was used during the regular course of business. The record before us contains no evidence suggesting the microwave oven was neither accessible nor used during the time in question. In short, it is obvious that appellant was aware of the cocaine on the floor and in the microwave.

We hold that, although Saul obtained a cup of coffee and Cartel obtained food from behind the counter earlier that evening, the evidence was more than sufficient for

the suppression judge to conclude that appellant was aware of, and had constructive possession of the cocaine.

III.

Appellant also contends that the suppression judge erred in admitting the following hearsay testimony from Officer Huff:

> Q. Have you received any information about the Players Pool Hall?
>
> A. Yes.
>
> Q. What information have you received?
>
> A. That there was –
>
> MR. POPKIN [defense counsel]: Objection.
>
> THE COURT: Well, this should be very limited.
>
> * * *
>
> . . . Overruled. . . .
>
> THE WITNESS: There was a subject there selling drugs.
>
> MR. POPKIN: Your Honor, I am going to object.
>
> THE COURT: Overruled. He said, "Subject there." There is more than one person there.
>
> BY MS. DIXON [prosecutor]:
>
> Q. Was that the reason that you went to the Players Pool Hall?
>
> A. Yes.
>
> Q. What happened when you got there?

A. I walked inside and talked to the night manager, Sylvester Anderson.

Q. Let me back up. Who went there with you?

According to appellant, "[t]he hearsay . . . was prejudicial because it implied to the jury that there had been a complaint that Appellant was selling cocaine. Thus, the jury would infer that the cocaine in the pool hall belonged to Appellant rather than to one of the other employees or to a customer." This contention has no merit.

Hearsay is an out of court statement, other than one made by the declarant while testifying at the trial, offered in court to prove the truth of the matter asserted. *McCray v. State*, 84 Md. App. 513, 518, 581 A.2d 45 (1990), *cert. denied*, 322 Md. 131 (1991). Viewed in that context, Officer Huff's testimony was offered to explain why the officers were at Players. As we noted in *McCray*, " '[i]n criminal cases, an . . . investigating officer should not be put in a false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct.' " *Id.* at 518 (quoting E.W. Cleary, *McCormick on Evidence* § 249 (3d ed. 1984)).

Even if the testimony complained of was offered as proof that a "subject" was selling drugs, nothing said by Huff implied that the "subject" was appellant. Huff's specific reference to appellant implied only that he had spoken with appellant because appellant was the night manager. There was no error.

IV.

Appellant penultimately contends that the suppression judge abused his discretion by accepting Officer Parker's opinion that the cocaine at issue was packaged for sale, rather than for personal use. Appellant points out that Parker had not been qualified as an expert. We disagree.

In *Yeagy v. State*, 63 Md. App. 1, 22-23, 491 A.2d 1199 (1985), Officer Sheppard's testimony concerned packaging drugs for sale, the equipment used to distribute drugs, and the quantities in which drugs were distributed. *Id.* at 23, Yeagy objected to Sheppard's opinion because Sheppard had not qualified as an expert. *Id.* at 22.

In *Yeagy*, we wrote

> [i]n certain instances, a non-expert may give an opinion based on his special observations and expertise. Whether to allow such testimony lies within the sound discretion of the trial court. Police officers often qualify as non-expert witnesses based on their professional knowledge and experience. *See, e.g., Brooks v. State*, 13 Md. App. 151, 158 . . . (1971), *cert. denied*, 264 Md. 746 (1972) ("An experienced narcotics officer is qualified to express an opinion that puncture scars on a subject's arms were made by hypodermic needles."); *Mullaney v. State*, 5 Md. App. 248, 261 . . . (1968), *cert. denied*, 252 Md. 732 (1969) ("[A]n experienced police officer with a substantial background in the field of narcotics . . . was qualified to express an opinion that the smoke he smelled and observed emanated from the burning of marijuana."); (*Silbert v.*

> *State*, 12 Md. App. 516, 541 . . . *cert. denied*, 263 Md. 720 (1971) (police officer, experienced in lottery and gambling operations, possessed sufficient expertise to give opinions relating to alleged gambling paraphernalia and other matter.).

Yeagy, 63 Md. App. at 22-23. *See also State v. Wadlow*, 93 Md. App. 260, 273, 611 A.2d 1091 (1992).

Here, Parker testified that crack cocaine is ordinarily packaged in small $20 or $50 baggies; the baggies seized were $20 baggies with a total street value of $400; such a quantity would be for sale on the street, not for personal use; and that guns are used by a dealer for protecting the drugs and money. Prior to giving his opinion, Officer Parker said that he had been with the Prince George's County Police Department for eight years and for three and one half of those years was assigned to the Narcotic Enforcement Division. Parker said he had received specialized training and had attended several courses in narcotics detection, identification, and packaging of narcotics for sale as well as for personal use. Parker worked as an undercover officer, was involved in 300 to 350 drug-related arrests, and had personally observed how drugs were packaged, bought, and sold on the streets. There was no error.

V.

Appellant finally contends that the trial judge erred in sustaining an objection to his counsel's arguing the law during closing argument. We again disagree.

It is within the discretion of the trial judge to control the course of closing arguments and we shall not interfere unless " 'there has been an *abuse of discretion* by the trial judge of a character likely to have injured the complaining party.' " *Stevenson v. State*, 94 Md. App. 715, 729, 619 A.2d 155 (1993) (quoting, *Wilhelm v. State*, 272 Md. 404, 413, 326 A.2d 707 (1974) (emphasis in original)).

In Maryland, counsel is prohibited from arguing the law in closing argument "when there is no dispute as to the law." *Montgomery v. State*, 292 Md. 84, 87-89, 437 A.2d 654 (1981); *Stevenson v. State*, 289 Md. 167, 178-81, 423 A.2d 558 (1980); *White v. State*, 66 Md. App. 100, 118, 502 A.2d 1084 (1986); *Newman v. State*, 65 Md. App. 85, 101, 499 A.2d 492 (1985), *cert. denied*, 305 Md. 419 (1986). As we said in *White*:

> [W]here there is no dispute as to the law, counsel will not be permitted to argue law even where the argument is "consistent" with the court's instructions. Arguing law includes "stating, quoting, discussing, or commenting upon a legal proposition, principle, rule, or statute." *Bonner v. State*, 43 Md. App. 518, 524 . . . (1979).

White, 66 Md. App. at 118.

In the case at hand, there was no dispute as to the law governing possession with intent to distribute cocaine. Although counsel for appellant was familiar with the instructions before they were given to the jury, and under Md. Rule 4-325 could have objected to the definition of possession with intent to distribute cocaine, he failed to do so. *White*, 66 Md. App. at 118.

There was no abuse of discretion.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

SYLVESTER JOHN ANDERSON	*	In the Court of Appeals of Maryland
v.	*	Petition Docket No. 581
STATE OF MARYLAND	*	September Term, 1994
	*	(No. 17, September 1994,
	*	Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the answers and conditional cross-petition filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: March 7, 1995